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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 475

GRADY LEE McHUGH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

**PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF FLORIDA AND BRIEF IN
SUPPORT THEREOF.**

✓
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INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari.....	1
Summary statement of the matter involved.....	1
Jurisdictional statement.....	6
Prayer for writ of certiorari.....	7
Brief in support of petition.....	9
Jurisdiction.....	9
Statement of the case.....	11
Argument.....	13
The right to be immune from a second prosecution a fundamental right protected by the 14th Amendment.....	13
Here there was a single offense.....	16
Where two or more persons are killed by the same, single, identical, indivisible act or transgression if a crime or offense is thereby committed it is a single, indivisi- ble crime or offense and not multiple crimes or offenses.....	19
There was no material difference between the charge of which he was acquitted, and that of which he was convicted.....	25
McHugh's acquittal completely negated every material allegation of the informa- tion on which he was later convicted.....	28
<i>Appendix—State v. McHugh</i> , 36 So. (2d) 786.....	33

TABLE OF CASES AND AUTHORITIES CITED

<i>Begg v. Beeler</i> , 108 Ten. 198, 173 S. W. (2d) 946.....	18
<i>Brown v. Mississippi</i> , 297 U. S. 278.....	15
<i>Cannon v. State</i> , 91 Fla. 214, 107 So. 360.....	28
<i>Chambers v. Florida</i> , 309 U. S. 91.....	15
<i>Commonwealth v. Ernesto</i> , 93 Pa. Super. Ct. 339.....	20
<i>Commonwealth v. Veley</i> , 36 Pa. Super. Ct. 489.....	19

Constitution of Florida:

	Page
Sections 1, 5, 24, 25 and 28 of Art. 5	10
22 C.J.S. "Criminal Law"—392	28
Code (Iowa) Sec. 13915	30

Florida Statutes, 1941:

Sections 32.01	9
32.16	9
32.18	9
782.01	26
782.07	26
782.08	26
782.09	26
782.10	26
782.11	27
782.13	27
782.14	27
782.15	27
860.01	27
924.01	10
924.06	10
924.08	10

Laws of Fla., c. 20719 Laws of 1941	27
<i>Ex parte Lange</i> , 85 U. S. 163, 18 Wall. 163, 21 L. Ed. 872	13
<i>Gunter v. State</i> , 111 Ala. 23, 20 So. 632	21
<i>Moore v. Illinois</i> , 55 U. S. 13	18
<i>McHugh v. State</i> , 36 So. (2d) 786	2, 9, 10
<i>Kepner v. U. S.</i> , 195 U. S. 100, 100 S. Ct. 137, 49 L. Ed. 114	15
<i>Screws v. U. S.</i> , 325 U. S. 91	7, 15
<i>State v. Casgrove</i> (N. J.), 135 Atl. 871	21
<i>State v. Evans</i> , 33 W. Va. 417, 10 S. E. 792	18
<i>State v. Wheelock</i> , 216 Iowa, 1428, 250 N. W. 617	17
<i>U. S. v. Adams</i> , 281 U. S. 202	27
<i>U. S. v. Buckner</i> , 37 F. (2d) 378	27
<i>U. S. v. Miner</i> , Fed. Case No. 15980	31
U. S. Code — 28 U. S. C. A. 344	6, 10

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STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI

*To The Honorable Fred M. Vinson, Chief Justice of the
Supreme Court of the United States, and the Associate
Justices Thereof:*

Summary Statement of the Matter Involved

On August 18, 1946, in Dade County, Florida, petitioner, Grady Lee McHugh, while driving an automobile, collided with a motor scooter upon which two boys, Charles Peeples and Robert Collins, were riding, as a result of which both boys were killed. McHugh was charged in one Information (Case No. 14581) with manslaughter for the death of Charles Peeples, and in another Information (Case No. 14582) with manslaughter for the death of Robert Collins. He was first tried for manslaughter for the death of Charles Peeples (Case No. 14581) and acquitted, after which the

State forced him to trial on the second Information (Case No. 14582) notwithstanding his plea that he had already been acquitted of the supposed offense, and secured a conviction. McHugh appealed to the Supreme Court of Florida, challenging the State's right under the 14th Amendment to the Constitution of the United States to try him a second time for manslaughter resulting from a single, identical, indivisible, unintentional act or omission after he had been once acquitted of that offense, and discharged thereon. The Supreme Court of Florida affirmed the judgment (*McHugh v. State*, Fla. 36 So. (2d) 786), denied a petition for rehearing, and stayed enforcement of the judgment pending an application to this Court for certiorari to review said judgment of affirmance; hence this petition for certiorari.

How the Question Arose and Was Presented

On October 24, 1946, the State of Florida filed an information against Grady Lee McHugh (Record: 1-2) charging him with manslaughter by culpable negligence for the death of Robert Collins. On June 12, 1947, that information was quashed on motion of the County Solicitor, prosecuting for the State, and an Amended Information was filed. (Record: 2) The Amended Information (Record: 3-4) charged manslaughter by culpable negligence, and the *second* (Record: 3-4) charged manslaughter by operating a motor vehicle while intoxicated.

To said Amended information defendant (Petitioner) filed a plea of *autrefois acquit* (Record: 5-7) alleging that the Robert Collins, named in said amended information was the same person who, together with one Charles Peeples was riding on a motor scooter at the time and place mentioned in said amended information, at the time said motor scooter was struck by an automobile driven by said defend-

ant, as a direct and proximate result whereof said Robert Collins and Charles Peeples sustained mortal injuries of which they and each of them did die; that on October 24, 1946, the State of Florida by and through its County Solicitor filed information in the name of said State, which was docketed as Case No. 14581, whereby said State charged that said Grady Lee McHugh on August 18, 1946, did by his act, procurement and culpable negligence operate a motor vehicle in such a negligent, careless and reckless manner as to run into, upon and against Charles Peeples with such force and violence as to inflict upon his body certain wounds from which he died, etc., contrary to the form of the Statute and against the peace and dignity of the State of Florida; that the Charles Peeples mentioned in said information was the same person who was riding on said motor scooter with said Robert Collins, and the alleged collision mentioned in said information was the same collision aforesaid as a result of which both said Robert Collins and said Charles Peeples suffered and sustained mortal injuries of which both of them died as aforesaid; that on December 12, 1946, said defendant (Petitioner) was arraigned in open court and pleaded not guilty thereto and elected to be tried by jury; on April 29, 1947, said issue came on for trial in said court before Honorable Ben C. Willard, as Judge, and a jury, duly sworn, who returned their verdict finding said defendant (Petitioner) not guilty of said offense; that said verdict was duly received, filed and said jurors discharged from further consideration of said cause, upon consideration whereof the Court entered its judgment that said defendant (Petitioner) was not guilty, whereby said defendant (Petitioner) was wholly acquitted of said charge and discharged, and that said offense is the same identical offense as that charged in the (Amended) information filed in said cause.

To said plea the State filed a demurrer (Record: 8) which the Court by its order (Record: 8) sustained.

Defendant (Petitioner) then pleaded "not guilty" (Record: 8) and the cause proceeded to trial upon said amended information and plea of not guilty. (Record: 9) At the close of the State's case, the Assistant County Solicitor elected (Record: 9) to abandon the First Count (Record: 3-4), whereupon the court instructed the jury (Record: 9) that the State had elected to abandon the first count, and to rely on the second count.

The jury returned a verdict (Record: 9) finding defendant (Petitioner) guilty, upon which the court entered judgment, and imposed sentence. (Record: 10) Defendant (Petitioner) filed a motion for new trial which the Court denied. (Record: 10-11.)

Defendant (Petitioner) filed his notice of appeal to the Supreme Court of Florida (Record: 11) and filed his grounds of appeal (Record: 12-13) or assignments of error, which were:

(1) The Court erred in sustaining the State's demurrer to defendant's plea of *autrefois acquit* by its order (T. 14-15) entered in said cause on June 23, 1947, recorded and entered by the Clerk of said Court in Minutes of said Court (T. 15), in Criminal Court of Record Minute Book A-14 at page 405, of the Minutes of said Court.

(10) The Court erred (T. 173) in adjudging defendant guilty upon the verdict.

(11) The Court erred (T. 174) in imposing sentence upon defendant.

(12) The Court erred in entering judgment and sentence (T. 177-178) on September 18, 1947, as recorded in Criminal Court of Record Minute Book A-15 at page 68 of the minutes of said Court.

(13) The Court erred by its order denying defendant's motion for new trial (T. 184), entered on September 23, 1947, recorded in Minute Book A-15 at page 72 of the Minutes of said Court.

(15) By its order sustaining the State's demurrer to defendant's plea of *autrefois acquit* (T. 14-15) and by its judgment and sentence (T. 177-178) the Court denied defendant the protection of Section 12 of the Declaration of Rights of the Constitution of Florida, and denied defendant the protection of the Fifth Amendment of the Constitution of the United States, and denied defendant the protection of the Fourteenth Amendment of the Constitution of the United States.

The record on appeal was prepared pursuant to written directions (Record: 13-14) and said cause was submitted to the Supreme Court of Florida which rendered its opinion (Record: 14-16) that the judgment should be affirmed, and its judgment (Record: 16) of affirmance. Appellant (Petitioner) filed his petition for a rehearing (Record: 19) which was denied by order (Record: 18) entered on September 27, 1948.

On October 6, 1948, Appellant (Petitioner) filed an application for a stay of proceedings (Record: 18-19) in order to permit him to apply to this Court for a writ of certiorari, and on said date the Court by its order (Record: 19-20) granted said stay conditioned that appellant (Petitioner) file a bond, which bond (Record: 19-20) was duly filed.

On December 10, 1948, the appellant (Petitioner) and the Appellee (Respondent) filed in the Supreme Court of Florida, a stipulation (Record: 20-24) indicating the portions of the record to be included in the transcript of record to be filed in this Court, and the record has been prepared, transmitted to and filed in this Court.

Jurisdictional Statement

The final decision and judgment of the Supreme Court of Florida was entered on the date hereinabove given and the jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U.S.C.A. 344. This Petitioner asserts and claims that his rights, privileges and immunity secured and guaranteed him under the Fourteenth Amendment to the Constitution of the United States have been denied him, and that he has been deprived of his liberty without due process of law by the order (Record: 8) of the Court sustaining the State's demurrer to his plea of *autrefois acquit*, and by the order (Record: 11) denying his motion for new trial, and by its judgment and sentence (Record: 14-16) and judgment (Record: 16) of affirmance by the Supreme Court of Florida, and by the order (Record: 18) of said Supreme Court denying his petition for a rehearing, because, Petitioner respectfully contends that since his plea (Record: 5-7) which was admitted by demurrer, shows that the death of the two boys, Charles Peebles and Robert Collins was the result of a single, identical, individual act or omission on the defendant's (Petitioner's) part, without any intention on his part either to injure them or cause their deaths, that the State of Florida had no lawful right under the Fourteenth Amendment to the Constitution of the United States and Sections 1 and 12 of the Declaration of Rights of the Constitution of Florida, to carve out of that single, identical, indivisible and unintentional act or omission more than *one offense* or crime, to-wit: manslaughter, and that when defendant (Petitioner) was acquitted upon said charge of manslaughter arising out of said single, indivisible, unintentional act or omission, as alleged in his plea (Record: 5-7) the power of the State to prosecute was thereby ex-

hausted, and he could not be tried for manslaughter a second time without depriving petitioner of his rights, privileges and immunities as a citizen of the United States, nor without depriving him of liberty without due process of law guaranteed by said Amendment, as defined by this Court in *Betts v. Brady*, 316 U. S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595 and *Screws v. U. S.*, 325 U. S. 91, 65 S. Ct. 1038, 89 L. Ed. 1495, Test 1499, and that said question decided by the Supreme Court of Florida, has not theretofore been determined by this Court or has been decided by the Supreme Court of Florida in a way not in accord with applicable decisions of this Court.

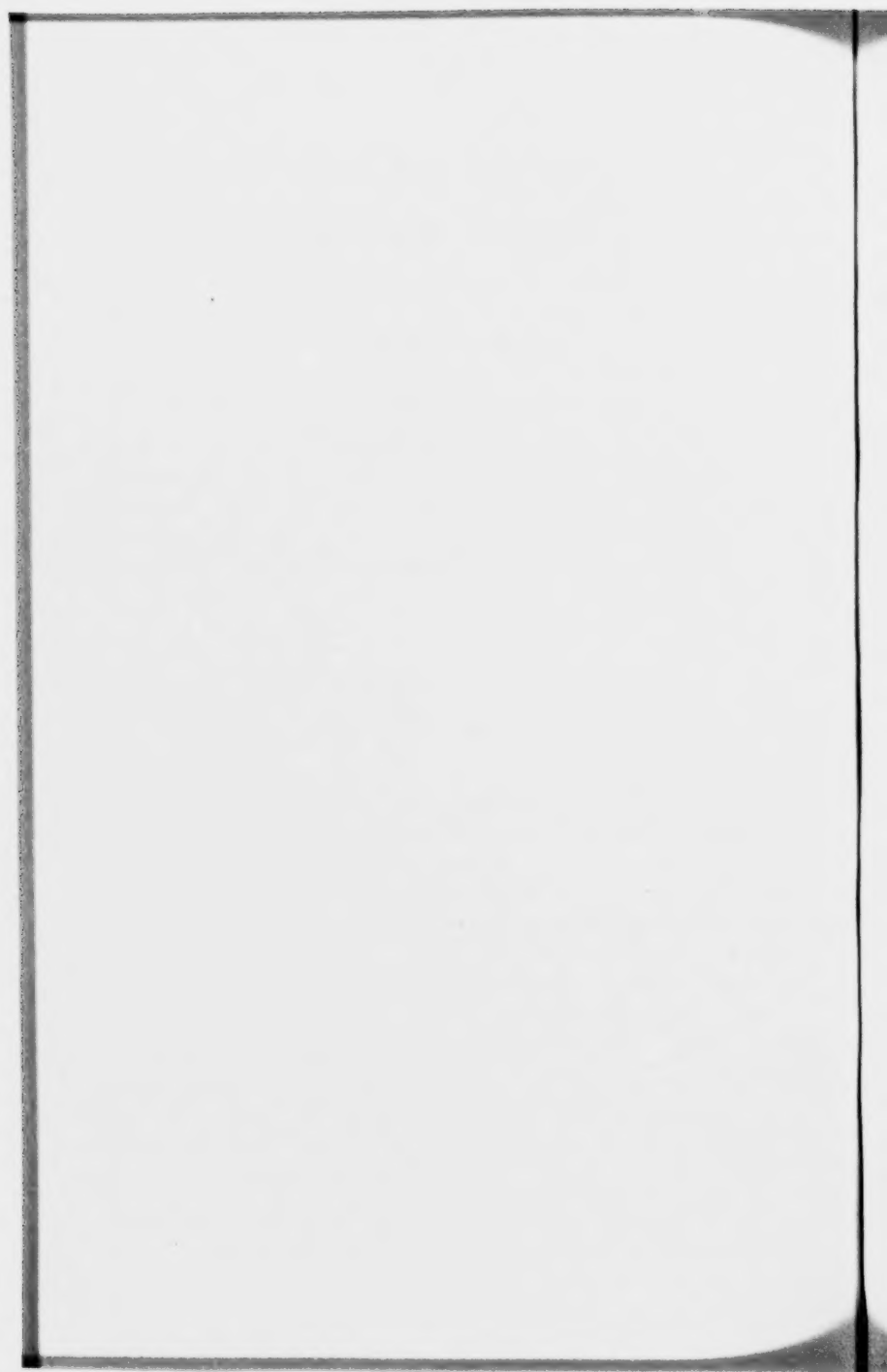
Prayer

Wherefore your petitioner prays that Writ of Certiorari issued under the Seal of this Court, directed to the Supreme Court of Florida commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court had in the case of Grady Lee McHugh, Appellant, versus State of Florida, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the Judgment hereof of said Supreme Court be reviewed by this Court and for such further relief as to this Court may seem proper.

Dated this 20th day of December, 1948.

L. J. Cushman, Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 475

GRADY LEE McHUGH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

Petitioner, Grady Lee McHugh, seeks to review by certiorari the opinion and judgment of the Supreme Court of Florida reported as *McHugh v. State* (Fla.), 36 So. (2d) 786, reprinted in full as an appendix hereto.

Jurisdiction

The Supreme Court of Florida is the highest court of that state in which a decision could be had,¹ and this peti-

¹ The Criminal Court of Record of Dade County, Florida, was established by c. 5764 Laws of Fla. 1907; c. 6573 Laws of Fla. 1913, pursuant to Sec. 24, Art. 5, Constitution of Florida and vested with jurisdiction (Sec. 25, Art. 5, Const. of Fla.; Sec. 32.01 Fla. Stat. 1941) to try all criminal cases not capital, upon information (Sec. 28, Art. 5, Const.; Sec. 32.18 Fla. Stat. 1941) filed by the County Solicitor, designated as Prosecuting Attorney (Sec. 32.16 Fla. Stat. 1941). Proceedings in said Court are

tion for certiorari is sought to review its final judgment or decree rendered in a certain cause lately determined by it, entitled Grady Lee McHugh, Appellant vs. State of Florida, Appellee. (*McHugh v. State*, 36 So. (2d) 786), jurisdiction of this court being invoked under Section 237 (b) of the Judicial Code, as Amended by the Act of February 13, 1925, Ch. 229; 43 Stat. 937; 28 U.S.C.A. 344, upon the ground that by said opinion and judgment petitioner was deprived of his rights, privileges and immunities guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and was or will be thereby deprived of his liberty without due process of law, in violation of said Amendment, in that the supposed offense charged against him by the information (Record: 3-4) upon which he was convicted (Record: 10) was only a mere part of a single, identical, indivisible offense or crime of manslaughter for which he had previously been tried, found "not guilty", acquitted and discharged, and that by the opinion and judgment of the Supreme Court of Florida affirming said judgment of conviction, petitioner was deprived of his right and privilege to be thereafter immune from further prosecution for the same offense, and was or will be deprived of his liberty thereby (unless same be reversed by this court) without due process of law because said conviction for the same identical, single, indivisible offense of which he had previously been tried, found "not guilty", acquitted and discharged, and in affirming said conviction, said Supreme Court of Florida denied petitioner his fundamental rights and departed from long established procedural requirements which divested the State Court of Jurisdiction of said cause as well

reviewable by appeal (Sec. 924.01 and 924.06 Fla. Stat. 1941) from the Criminal Court of Record to the Supreme Court, Sec. 924.08 Fla. Stat. 1941; Sec. 5, Art. 5 Const.) the Supreme Court being the highest court, and court of last resort of said State. See: Sec. 1, Art. 5, Constitution of Fla.

as of petitioner, therefore the sentence and judgment imposed by the State Court, and the opinion and judgment of the Supreme Court of Florida affirming same was illegal, and if same remains effective petitioner will be deprived of his liberty in violation of his right as secured by the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

On August 18, 1946, in the darkness before dawn, Grady Lee McHugh was driving an automobile in an easterly direction on the Tamiami Trail in Dade County, Florida. At the same time two boys, Charles Peebles and Robert Collins, riding on a motor scooter without lights, were also proceeding east on the Tamiami Trail. McHugh ran into the scooter, and as a result, both boys received injuries from which they died. On October 24, 1946, two informations were filed against McHugh in the Criminal Court of Record of Dade County: The *first*, Case No. 14581, charged him with manslaughter for causing the death of Charles Peebles by culpable negligence in the operation of an automobile.²⁻³ The *second* Case No. 14582, (Record: 1) charged him with manslaughter for causing the death of Robert Collins by culpable negligence in the operation of an automobile. On April 29, 1947, McHugh was tried before a jury for manslaughter upon the information in Case No. 14581, and found "not guilty", acquitted and discharged. The County Solicitor then quashed the information which had been filed in Case No. 14582 charging manslaughter by culpable negligence (Record: 2) and filed an amended information (Record: 3-4) consisting of two counts; the *first* (Record: 3) was a mere re-statement of the original charge of manslaughter (Record: 1)

²⁻³ These facts were alleged in defendant's plea (Record: 5-6) and admitted by the State's demurrer (Record: 8).

based on culpable negligence, and the *second* (Record: 3-4) charged manslaughter by driving while intoxicated. Defendant (Petitioner) pleaded (Record: 5-7) his prior acquittal as a bar to further prosecution under the Amended Information, and the State demurred (Record: 8) and its demurrer was sustained (Record: 8) and thus, by that ruling, we contend, petitioner was denied his rights and privileges guaranteed by the Fourteenth Amendment to the Constitution of the United States. Defendant pleaded not guilty, and the cause proceeded to trial during which the State elected (Record 9) to abandon the *first* count (Record: 3) and to proceed on the *second* count (Record: 3-4) which resulted in a verdict (Record: 9) of guilty and a judgment and sentence (Record: 10) against him. An appeal was taken from that judgment and sentence (Record: 11-12) to the Supreme Court of Florida, and the order sustaining the State's demurrer to said plea was assigned as error (Record: 12), particularly in these words:

“(15) By its order sustaining the State's demurrer to defendant's plea of *autrefois acquit* (T. 14-15) and by its judgment and sentence (T. 177-178) the Court denied defendant the protection of Section 12 of the Declaration of Rights of the Constitution of Florida, and denied defendant the protection of the Fifth Amendment of the Constitution of the United States, and denied defendant the protection of the Fourteenth Amendment of the Constitution of the United States.”

The judgment was affirmed (Record: 14-16) and by this Petition, we seek to review the judgment of the Supreme Court of Florida, upon the ground that by its judgment of affirmance, petitioner has been denied his rights and immunity guaranteed by the Fourteenth Amendment, and has been deprived of his liberty without due process of law in violation of said Amendment.

ARGUMENT

The Right to Be Immune from a Second Prosecution a Fundamental Right Protected by the 14th Amendment

The source and foundation of the right not to be placed in jeopardy a second time for the same offense, the right relied upon here by petitioner, was clearly stated by Mr. Justice Miller, speaking for this court in *Ex parte Lange*, 85 U. S. 163, 18 Wall. 163, 21 L. Ed. 872:

“If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense.

And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause.⁴ *Nemo debet bis vexari pro una et eadem causa*. It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.

In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, “*Nemo bis punitur pro eodem delicto*.” (2 Hawk. P. C. 377), or, as Coke has it, “*Nemo debet bis puniri pro uno delicto*.” 4 Co. 43a; 11 Co. 95b. No

⁴ Underscored portion in italics in court's opinion.

one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

Blackstone in his Commentaries cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. 4 Black, 315 (Shars). —•••

In the case of *Com. v. Olds*, 5 Litt. 137, one of the best common-law judges that ever sat on the bench of the court of appeals of Kentucky remarked, "That every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question."

In the case of *Cooper v. State*, in the supreme court of New Jersey (1 Green N. J. 361), the prisoner had been indicted, tried, and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction at bar, and the supreme court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb; but the supreme court founded its argument on the provision of the Constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common

law maxim the court says: "The Constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. . . . Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*."

And Hawkins, in his *Pleas of the Crown* (pp. 515, 526), says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man shall . . . not be brought into danger of his life for one and the same offense more than once. * * *

See also, the discussion by Mr. Justice Day, in *Kepner v. United States*, 195 U. S. 100, 100 S. Ct. 137, 49 L. Ed. 114.

The right to be immune from a second prosecution for the same offense is one of the rights guaranteed and protected by the 14th Amendment to the Constitution of the United States: *Brown v. Mississippi*, 297 U. S. 278; *Chambers v. Florida*, 309 U. S. 91, 89 L. Ed. 1495; *Screws v. United States* 325 U. S. 91 where Mr. Justice Douglas, speaking for this court defined the rights protected by that Amendment as follows:

"There have been conflicting views in the Court as to the proper construction of the due process clause. The majority have quite consistently construed it in broad general terms. Thus it was stated in *Twining v. New Jersey*, 211 US 78, 101, 53 L ed 97, 107, 29 S Ct 14, that due process requires that 'no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of

law and protect the citizen in his private right, and guard him against the arbitrary action of government.' In *Snyder v. Massachusetts*, 291 US 97, 105, 78 L ed 674, 54 S Ct 330, 90 ALR 575, it was said that due process prevents state action which 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' The same standard was expressed in *Palko v. Connecticut*, 302 US 319, 325, 82 L ed 288, 292, 58 S Ct 149, in terms of a 'scheme of ordered liberty'. And the same idea was recently phrased as follows: 'The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of such denial.' *Betts v. Brady*, 316 US 455, 462, 86 L ed 1595, 1601, 62 S Ct 1252."

Here There Was a Single Offense

Charles Peeples and Robert Collins came to their deaths by the same, identical, single, indivisible act or transgression on the part of Grady Lee McHugh. If he was criminally responsible for the death of one, then of necessity, he was equally criminally responsible for the death of the other. On the other hand, if he was innocent of any crime arising out of the death of Charles Peeples, the conclusion is inescapable that he was likewise innocent of any crime arising out of the death of Robert Collins. How could McHugh be "not guilty" of manslaughter in connection with the killing of Robert Collins, his companion, whose death was the result of the same, identical, single, indivisible, unintentional act or transgression which brought about the death of Charles Peeples? Sometimes the law

does produce absurdities, but such results add nothing to confidence in the law, in the courts, nor in justice as administered by the courts. No amount of legal sophistry can make such a result conform to common sense.

In *State v. Wheelock*, 216 Iowa, 1428, 250 NW 617, Wheelock had been indicted for manslaughter for the deaths of Mildred Telfer, and her two daughters, Merwyn and Erma Telfer, all of whom had been killed in the same automobile accident. Three indictments had been returned, each charging manslaughter for the killing of one of the victims of the wreck. He was first placed on trial for manslaughter upon the charge of killing Mildred Telfer, the mother, and was acquitted. The court pointed out the dilemma presented by a result such as that reached by the court in the case at bar, saying:

"The question presented to us is whether the defendant was subject under the circumstances to three prosecutions under three indictments or whether a prosecution of one operated as a bar to the others.

* * * *The state contends* that the killing of three persons necessarily results in the commission of three separate offenses, and that therefore judgment in one may not operate as a bar to another. *On the other hand, the defendant contends* that the act of transgression charged against defendant was essentially, and in a legal sense a single act, the result of which was at no time contemplated or intended by the defendant.

* * * if the defendant was not guilty of the conduct that resulted in the death of Mrs. Telfer, as adjudicated in the first prosecution, he could not be guilty of causing the death of either daughter. The acquittal in the first prosecution would be completely contradicted by a conviction in the second."

Thus, in the case at bar, the acquittal of McHugh in the first prosecution (Case No. 14581) was completely contradicted by the conviction in the second. (Case No. 14582)

In cases where several people are killed, can the state prosecute, again and again and again, until at last some jury is found who will convict? In *State v. Evans*, 33 W. Va. 417, 10 S. E. 792, Lucas, J., speaking of the identity of offenses necessary to sustain a plea of *autrefois acquit*, said:

“A case can be conceived where such a plea might be held good. For example, the engineer of a railway train might be charged with negligently and feloniously causing the death of one passenger in a wreck, and, being tried and found by the jury entirely blameless for the accident, such acquittal might perhaps, constitute a perfect defence to a subsequent indictment for killing another passenger, who was on the same train.”

Let us suppose that a bus driver, operating a bus with fifty (50) passengers should be involved in a crossing accident, and as a result all fifty (50) of his passengers were killed, he alone having escaped. Suppose he were indicted in fifty (50) separate indictments, for manslaughter, each indictment naming a different passenger. Could he be tried, and acquitted in forty-nine (49) cases, and still convicted in the last case? Such a result would be ridiculous—yet, if the judgment in this case is permitted to stand, it could be done. The simple, inescapable fact is that from such a misfortune a single, indivisible crime or offense, to-wit: manslaughter, may arise, but not fifty (50) separate, distinct, independent crimes or offenses.

“An offense,” said Mr. Justice Grier, in *Moore v. Illinois*, 55 U. S. 13, 14 Haw. 13, 14 L. Ed. 306, text 309, “in its legal signification, means a transgression of a law.” And, “To ‘transgress’ is to violate or offend against.” *Beggs v. Beeler*, 180 Tenn. 198, 173 S. W. (2d) 946, 948, 153 A. L. R. 510.

Where Two or More Persons Are Killed by the Same, Single, Identical, Indivisible Act or Transgression If a Crime or Offense Is Thereby Committed, It Is a Single, Indivisible Crime or Offense, and Not Multiple Crimes or Offenses.

Commonwealth v. Veley, (1916) 36 Pa. Super. Ct., 489, is an excellent application of this principle, there several persons including Mrs. Eva A. Gleaspey, Mrs. Julia Swartwood and Mrs. Nellie Lawler, lost their lives as result of the breaking of a dam due to defendant's culpable negligence. Defendants were tried for manslaughter for the deaths of Mrs. Gleaspey and Mrs. Swartwood, and acquitted, and thereafter the state attempted to prosecute them for manslaughter for the death of Mrs. Lawler, but the court held that the crime or offense, if any, was single and indivisible, and the acquittal put an end to the accusation forever. Orlady, P. J. speaking for the court said:

"No man who has been guilty of a crime against society, should be suffered to escape on a mere technical defense, not founded in any principle of natural justice or rule of public policy. But it is also true, that where a man has once been fairly tried, there ought to be an end of the accusation forever. The right not to be put in jeopardy a second time for the same cause, is as sacred as the right to trial by jury, and is guarded with as much care by the common law and by the Constitution. * * * The same principle is announced and followed in *United States v. Clark*, 31 Fed. Rept. 710; *People ex rel., Stabile v. The Warden*, 202 N. Y. 138; *Ex parte Neilsen*, 131 U. S. 176, 33 L. Ed. 118. The records present the case of several persons losing their lives through the same disaster, viz: the breaking of the dam of the Bayliss Pulp and Paper Company, which in each of these prosecutions is alleged to have been caused by the negligence of the relator through defective construction of the dam.

The negligent act, if any, which caused the breaking of the dam, was the act which caused the deaths of

the three women named. There was but one casual effect, though the result affected many parties.

In *Gunter v. State*, 111 Ala. 23, it was held that where the same act of unlawful shooting results in the death of the two persons, an acquittal on a trial for the murder of one of them bars a second prosecution for the killing of the other. To the like effect see *Sadberry v. State*, 39 Tex. Crim. R. 466; 46 S. W. 639; *State v. Damon*, 2 Tyler (Vt.) 287; *State v. Rosenbaum*, 23 Ind. App. 237; 77 Am. St. Repts. 432.

It follows from the foregoing authorities that, the criminal prosecution is for the injury done the commonwealth, and not for the injury done to the individual who may, if entitled, obtain redress through a civil action. Where there is but one act or cause of injury, or death of a number of persons, there is but one injury to the commonwealth, but where the acts or causes are separate, they are separate injuries to the peace and dignity of the commonwealth.

The protection afforded by the fifth amendment of the Constitution of the United States, that a person shall not be twice placed in jeopardy for the same offense, is not only to protect against the peril of a second punishment, but as well against being tried a second time for the same offense: *Kepner v. United States*, 195 U. S. 100; 49 L. Ed. 114.

The common law not only prohibited a second punishment for the same offense, but went further, and forbid a second trial for the offense, whether the accused had suffered punishment or not, and whether, in the former trial, he had been acquitted or convicted: *Ex parte Lange*, 18 Wall 163; 21 L. Ed. 872.

If the case, as presented by this record, was before a jury the trial judge would be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered."

Commonwealth v. Ernesto (1928) 93 Pa. Super. Ct. 339 was a similar case. A wife and six children lost their lives in a fire which destroyed their home. Defendants were

indicted for manslaughter in seven counts, the first charging manslaughter based upon the death of the wife, and each of the remaining six on the death of a child. The defendants were found guilty on all seven counts, but the court held that the defendants could be sentenced upon only one count, saying:

“When there is but one act or cause of injury, or death of a number of persons there is but one injury to the commonwealth, but where the acts or causes are separate, they are separate injuries to the commonwealth. * * * The same unlawful act which caused the death of anyone of the persons mentioned in the indictment caused the deaths of the others. There was but one injury to the commonwealth involved in this prosecution and that neither a malicious nor an intentional one insofar as its unfortunate results are concerned.”

In *State v. Cosgrove* (N.J.) 135 Atl. 871, the court applied the same principle in holding that:

“Where automobile driver struck two girls crossing street causing death of one and was acquitted for manslaughter for her death, his plea of autrefois acquit was a good plea in bar to indictment for atrocious assault and battery on the other, since both crimes were product of same act.”

In *Gunter v. State*, 111 Ala. 23, 20 So. 632, was a case in which two people had been killed by a single, indivisible act. Haralson, J., speaking for the court said:

“It is the settled rule of this court, that a defendant cannot be lawfully punished for two distinct felonies, growing out of the same identical act, and where one is a necessary ingredient of the other; that a series of charges cannot be based upon the same offense, and subdivided into two or more indictable crimes. So, it has been held, that where the same act of unlawful shooting resulted in the death of persons, an acquittal

or conviction on the trial of one would be a good defense on a second trial for the alleged murder of the other, for the reason that the killing constituted but one crime, which could not be subdivided and made the basis of two prosecutions. *Clem v. State*, 42 Ind. 420. And again, where one blow produces two separate assaults and batteries on two different persons, a conviction of one may be pleaded in bar to an indictment for the other, for the reason that the defendant cannot be punished for two distinct assaults growing out of the same identical act. *State v. Damon*, 2 Tyler (Vt.) 387; *State v. Cooper*, 13 N. J. Law, 361. These cases and the principles announced, were referred to and approved in *Hurst v. State*, 86 Ala. 604, 6 South, 120, where the same question was considered and decided by this court upon a careful review of many authorities. *Hurst* was indicted, tried and convicted for having introduced a file into the county jail, with the intent to facilitate the escape of a prisoner, confined on a charge of a misdemeanor. At the same term of the court, defendant was indicted, tried and convicted for the same act of conveying into the county jail the same file with which to facilitate the escape of another prisoner, confined on a charge of felony, and it was held, on a plea of *autrefois* convict, that the first conviction was a bar to the indictment in the latter case. *O'Brien v. State*, 91 Ala. 25, 8 South, 560; *Moore v. State*, 71 Ala. 387; *Gordon v. State*, Id. 317. It must not be overlooked, however, that the same individual may at the same time and in the same transaction commit two or more distinct criminal offenses, and an *e-quittal* of one will not bar punishment for the other, as if in the same affray, one person shoots and kills one person, and by a second act shoots and wounds another. In such case, the two results, the killing of the one and the wounding of the other, by different acts of shooting, cannot be said to grow out of the same unlawful act, but out of two distinct acts, and the party shooting is responsible for the two results from the two separate acts, and may be indicted and punished separately

for each. *State v. Standifer*, 5 Port. (Ala.) 523; *Cheek v. State*, 38 Ala. 231; and authorities *supra*."

Wheelock v. State, *supra*, is an exceptionally well considered case in which Wheelock had been charged in three (3) separate indictments with manslaughter for the death of three (3) members (a mother and two daughters) of the Telfer family in an automobile accident; he was tried and acquitted of manslaughter for the death of the mother, and the court held that the crime or offense, if any, was a single, indivisible crime or offense, and his acquittal upon the charge of manslaughter for death of the mother barred further prosecution. This court in part, said:

"The question presented to us is whether the defendant was subject under the circumstances to three prosecutions under three indictments or whether a prosecution of one operated as a bar to the others. The appeal is by the state. Broadly speaking the state contends that the killing of three persons necessarily results in the commission of three separate offenses, and that therefore judgment in one may not operate as a bar to another. On the other hand, the defendant was essentially and in a legal sense a single act, the result of which was at no time contemplated or intended by the defendant. * * * The basic proposition emphasized by the state is that the prohibition of double jeopardy under the Constitution and under the statute is applicable only where the 'same offense' is involved. In identifying an offense as the 'same offense', the state contends that the indictments must disclose the identity both 'in fact and in law', and that there must be an identity, not only of the act of transgression charged against the defendant, but also of the indictable offense as named and defined by the statute. This indicates the general objective of the state's argument. On the other hand, the defendant contends that, in order to find a plurality was contemplated and intended. Cases of murder, robbery, and larceny often come within this category; whereas, *in the case at bar*.

the single act of transgression was that of negligence. The actual results thereof were not contemplated at all and no killing was intended. Concededly the manslaughter was involuntary. The debate between counsel comes down to the point whether the authorities recognize a distinction as to the plurality of offenses which result from accidental causes and those which result from distinct criminal intent and intentionally felonious acts. * * *

“Under the doctrine of *State v. Price*, supra, if the defendant was not guilty of the conduct that resulted in the death of Mrs. Telfer, as adjudicated in the first prosecution, he could not be guilty of causing the death of either daughter. The acquittal in the first prosecution would be completely contradicted by a conviction in the second. * * *

Except as to cases of involuntary manslaughter, it is not the purpose, or the purport, of this opinion, to establish any new precedent or to extend or restrict what has already been said in our own cases. Our opinion herein shall go no farther than to determine whether an involuntary manslaughter of two or more persons attributable to the single negligence of the defendant, without any intent on his part to cause any injury, is a single or a multiple offense. If the respective courts differ in their conclusions in cases involving other offenses, such differences arises nevertheless on the question of fact as to whether the intent of the perpetrator was single or plural. In the case before us there is no basis for the claim of multiple intent either as a question of fact or of law. In the careful research of counsel for the state, no manslaughter case has been found to support its contention. All the cases which involve manslaughter speak with one voice on this subject. * * *

In line with all the other courts which have passed upon the specific question, we now hold only that an act of negligence on the part of a tort-feasor, which results in the involuntary killing of two or more human

beings, is ordinarily a single offense and is subject to one prosecution. Such was the case here."

We therefore respectfully submit that in the case at bar if the automobile accident in which Charles Peeples and Robert Collins met their deaths was the result of any crime or offense, or resulted in a crime or offense, it was a single, indivisible offense, and not a multiple crime or offense, and his acquittal upon the charge of manslaughter based upon the death of one of the two boys "should end the accusation forever;" in the language of the court in *Commonwealth v. Veley, supra*:

"* * * where a man has once been fairly tried, there ought to be an end of the accusation forever."

There Was No Material Difference Between the Charge of Which He Was Acquitted, and That of Which He Was Convicted.

The offense charged in the *first* information (Case No. 14581) was manslaughter, and McHugh was acquitted of that charge upon the trial of that case. Count one (Record: 3) and Count two (Record: 3-4) of the *second* or amended information (Case No. 14582) both charged manslaughter. The first (Case No. 14581) information (Record: 6) charged manslaughter in this language, *i.e.*, that McHugh:

"* * * did then and there by his act procurement and culpable negligence operate a certain motor vehicle in such negligent, careless and reckless manner as to run into, upon and against Charles Peeples with such force and violence as to inflict in and upon the body of the said Charles Peeples mortal injuries of which he the said Charles Peeples then and there died contrary to the form of the Statute," etc.

The original information in Case No. 14582 (Record: 1) charged manslaughter based on the death of Robert Collins

in exactly the same terms. The first count (Record: 3) of the Amended Information in Case No. 14582 charged manslaughter and duplicated the charge in the original information, and also the charge in the first case quoted above. The second count (Record: 3-4) of the amended information, likewise charged manslaughter in that McHugh:

“* * * did then and there unlawfully, while intoxicated drive a certain motor vehicle * * * and by driving and operating said motor vehicle as aforesaid, while intoxicated as aforesaid, did then and there strike, wound and injure one Robert Collins, and by thus striking * * * did inflict * * * a certain mortal wound * * * from which * * * said Robert Collins did then and there die, contrary to the form of the Statute” etc.

The charge was “manslaughter”—nothing else. McHugh was acquitted of “manslaughter” for the death of one boy, and convicted of “manslaughter” for the death of the other: a legal paradox rivaling the riddle of the sphinx of ancient times.

“Manslaughter” is an offense defined by the law of Florida, which can be committed in nine (9) different ways.⁵

⁵ The Statutes of Florida contain these provisions with reference to manslaughter:

“782.01—*Homicide Generally*—The killing of a human being is either justifiable or excusable homicide, or murder or manslaughter, according to the facts and circumstances of each case.

782.07—*Manslaughter*—The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.

782.08—*Assisting self-murder*.

782.09—*Killing of unborn child by injury to mother*.

782.10—*Abortion*—(killing by).

Regardless of the method employed the offense is still manslaughter. The Statutes (Sec. 782.01, and 782.07) defining manslaughter, and all the other statutes⁵ declaring killings under various circumstances to be manslaughter, are part of Florida Statutes 1941, a compilation adopted as the Statutory Law of Florida by c. 20719 Laws of 1941, approved June 6, 1941. Hence, the statutes declare "manslaughter" a crime or offense which may be committed in the various ways specified by the several sections.⁵ Where a statute defines a crime or offense which may be committed in several ways it creates a *single crime or offense*, which however, may be committed in different ways—not distinct or different crimes. See: *U. S. v. Buckner* (1937) 37 F. (2d) 378; *U. S. v. Wilson*, 32 U. S. 150, 7 Pet. 150, 8 L. Ed. 640 and *U. S. v. Adams*, 281 U. S. 202, 50 S. Ct. 269, 74 L. Ed. 807. So, manslaughter is a single crime or offense, whether the killing be (1) "by the act, procurement or culpable negligence of another," as declared by Sec. 782.07, or (2) "by the operation of a motor vehicle by any person while intoxicated" as declared by Sec. 860.01, or any other of the circumstances declared by the statutes.⁵ Murder is murder, whether committed with a gun, a knife, a club, poison or with any other method, and an acquittal on a charge of murder by a gun would bar any further prosecution for the same offense whether the second charge alleged the crime to have been committed with a knife, a club or poison. The mere fact that the prosecution may fail because of a variance between the charge laid in the indictment, and the proof offered to sustain it, would not authorize the state to try a defendant a second time for the same offense by

782.11—*Unnecessary killing to prevent unlawful act.*

782.13—*Killing by Mischievous animal.*

782.14—*Death from racing steamboat.*

782.15—*Killing by intoxicated physician.*

860.01—*Driving automobile while intoxicated; punishment.*

merely changing the allegation as to the *means employed* to perpetrate the crime, because jeopardy attaches *when the accused is placed on trial and the jury sworn and empaneled even though no verdict is ever returned*, as when the state elects to enter a *nolle prosequi* over the accused's objection. See: 22 C. J. S. "Criminal Law"—392.

McHugh's Acquittal Completely Negatived Every Material Allegation of the Information on Which He Was Later Convicted.

While the first information (Case No. 14581) charged manslaughter by the "act, procurement or culpable negligence" of the defendant, yet evidence to prove that he was intoxicated was clearly admissible upon the trial of that case, as the Supreme Court of Florida held in *Cannon v. State*, 91 Fla. 214, 107 So. 360, text (4) page 362. In that case the indictment had been drawn under Sec. 5039 R. G. S. 1920 (Sec. 782.07 Fla. Stat. 1941) and not under Sec. 5563 R. G. S. 1920 (Sec. 860.01 Fla. Stat. 1941), yet the court held that evidence of intoxication was admissible:

"It is therefore plain that this indictment is predicated upon said section 5039 of the Revised General Statute; that it does not omit any requisite averment as to any of the elements of the offense under said section (*Mills v. State*, 51 So. 278, 58 Fla. 74); and that it does not constitute a charge of two separate and distinct offenses in the same count (*Griswold v. State*, 82 So. 44, 77 Fla. 505), though the latter is allowable in certain cases, where a statute makes either of two or more distinct acts, connected with same general offense and subject to the same punishment, indictable as distinct crimes. *When in such cases such distinct acts are connected with the same general offense and committed by the same person at the same time, they*

may be coupled in the same count and constitute but one offense. *Irvin v. State*, 41 So. 785, 52 Fla. 51, 10 Ann. Cas. 1003.

As against the plaintiff in error, Bessie Cannon, the indictment is sufficient, without this allegation in regard to defendant being under the influence of intoxicating liquors, to charge her with manslaughter under said section 5039, and said allegation, not being necessary or essential to describe or charge the offense, and not descriptive of any matter necessary to be proved, may be treated as surplusage, not being essential to the charge of the crime defined in section 5039. This does not mean that testimony as to defendant being in such condition could not be admitted in evidence in support of the element of culpable negligence. *Hobbs v. State*, 91 So. 555, 83 Fla. 480; *Shaw v. State*, 102 So. 550, 88 Fla. 320; *Meier v. State*, 99 So. 124, 87 Fla. 133; *Denmark v. State*, 102 So. 246, 88 Fla. 244; *Mathis v. State*, 69 So. 697, 70 Fla. 194; *Padgett v. State*, 24 So. 145, 40 Fla. 451; *Norwood v. State*, 86 So. 506, 80 Fla. 613. * * *

It was permissible, as shown by some of the cases above cited, to allow the state to introduce evidence showing or tending to show that the defendant was under the influence of intoxicating liquor at the time the deceased was struck and injured, or that she was in that condition so shortly thereafter as to afford a reasonable inference that such condition existed at the time of the injury. See, also, 1 Wigmore on Evidence (2d Ed.) 235. This was admissible in support of the charge of culpable negligence, upon the theory that, ordinarily, persons under the influence of intoxicants to any considerable degree, though not actually intoxicated or drunk, are more apt to be heedless, reckless, and daring than when free from such influence. *Hobbs v. State*, supra; *Meier v. State*, supra."

Thus, it is clear that when McHugh was tried on the first information (Case No. 14581) drawn under Sec. 782.01,

evidence to prove intoxication was admissible, and as the court pointed out:

“When * * * such distinct acts⁶ are connected with the same general offense and committed by the same person at the same time they may be coupled in the same count AND CONSTITUTE BUT ONE OFFENSE.”

In other words, if it were true that McHugh was intoxicated, and was also guilty of culpable negligence, at the same time and place charged, it CONSTITUTED BUT ONE OFFENSE. If, as we contend there was BUT ONE OFFENSE, it could not be split into two prosecutions, and when McHugh was once acquitted, that put an end to the accusation forever. *Commonwealth v. Veley, supra*. We submit that there is no escape from the conclusion reached in *State v. Wheelock, supra*:

“Under Section 13915,⁷ every material allegation charged in each indictment was completely negatived by the acquittal upon the first prosecution.”

Not even the Attorney General will contend, we are confident, that the State could prosecute McHugh a second time for the death of Charles Peepels, after he has been acquitted, by merely changing the information to charge manslaughter by operation of a motor vehicle while intoxicated instead of by culpable negligence. This demonstrates that there was only a single crime or offense, to-wit: manslaughter,

⁶ That is, “culpable negligence” and “intoxication.”

⁷ Code ¶ 13915—“The jury must render a general verdict of “guilty” or “not guilty” which imports a conviction or acquittal upon every material allegation of the indictment,” etc. This is merely declaratory of the Common Law. 16 C. J. “Criminal Law”—1109, *Citing v. Francis*, 144 Fed. 520.

whether committed in one way or the other. The fact that two were killed is, under the authorities, immaterial, so far as converting a single, indivisible crime into two crimes.

In *United States v. Miner*, Fed. Case No. 15780 the defendant had been indicted for possessing a counterfeit plate, and acquitted. He was later brought to trial on a second indictment charging him with possession of a second counterfeit plate which had been in his possession at the same time and place as the first plate. The syllabus of the case is as follows:

“A defendant was tried on an indictment charging him with the possession of a counterfeit plate, and was acquitted. A second indictment was found against him, charging him with the possession of another counterfeit plate. He pleaded to the latter indictment, that he had been once tried and acquitted of the same act of possession stated therein. From the evidence to be given on the trial of the second indictment, it appeared, that *the act of possession charged was but a single act, and that the first trial necessarily involved a determination of the act of possession charged in the second indictment.* The verdict of the jury on the first trial met with the approval of the court, and it advised the district attorney that the defendant ought not to be again put on trial on the same evidence and that a nolle prosequi ought to be entered on the second indictment.”

Thus, in any view taken the conclusion is irresistible that there was but one offense, to-wit: manslaughter, and when McHugh was acquitted of that offense, that put an end to the accusation forever, and the state had no right to put him on trial upon the second information, and his plea of autrefois acquit should have been sustained and he should have been discharged, therefore the judgment of the

Supreme Court of Florida to the contrary should be reversed.

Respectfully submitted,

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APPENDIX**SUPREME COURT OF FLORIDA, EN BANC**

July 23, 1948

McHUGH

vs.

STATE

Rehearing Denied Sept. 27, 1948

Appeal from Criminal Court of Record, Dade County;
Ben C. Willard, Judge

Grady Lee McHugh was convicted of manslaughter by operation of motor vehicle while intoxicated, and he appeals.

Affirmed.

Cushman & Woodard, of Miami, for appellant.

J. Tom Watson, Atty. Gen., and Ernest W. Welch, Asst. Atty. Gen., for appellee.

ADAMS, Justice.

This appeal presents a question of former jeopardy.

Appellant drove an automobile into a motor scooter and killed two news boys riding thereon.

Under Sec. 782.07, Fla. Stat., he was informed against and charged with manslaughter for killing one of the boys through culpable negligence. He was also charged, under Sec. 860.01, Fla. Stat., with manslaughter for killing the other boy by operation of a motor vehicle while intoxicated.

[1] On the former charge he was acquitted and when the other case was called for trial a plea of former jeopardy was interposed. This plea went out on demurrer and upon a plea of not guilty a trial was had resulting in conviction. Section 12, Declaration of Rights, "No person shall be subject to be twice put in jeopardy for the same offense. * * *"

Elaborate briefs have been filed which reveal numerous cases in hopeless conflict.

In this jurisdiction the identical question has not been passed upon. We are of the opinion that the plea of former jeopardy was not tenable and the action of the court in sustaining a demurrer to it was proper. Our reasons are that this view is supported by the great weight of authority. See note in 172 A.L.R., page 1062 following a report of our decision in *State v. Bacon*, Fla., 30 So. 2d 744, 172 A.L.R. 1050. Also *People v. Allen*, 368 Ill. 368, N.E. 2d 397; 308 U.S. 511, 60 S.Ct. 132, 84 L. Ed. 436; *Fleming v. Commonwealth*, 284 Ky. 209, 144 S.W. 2d 220; *Commonwealth v. Maguire*, 313 Mass. 669, 48 N.E. 2d 665; *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353, 113 A.L.R. 215; *Fay v. State*, 62 Okl. Cr. 350, 71 P. 2d 768; *Lawrence v. Commonwealth*, 181 Va. 582, 26 S.E. 2d 54; *State v. Taylor*, 185 Wash. 198, 52 P. 2d 1252.

[2] Double jeopardy applies to the offense, not the act causing the criminal offense. The gist of this offense is the unlawful homicide of which there were two. There is an offense for each unlawful homicide. It is not difficult to imagine a case where a defendant might by criminal negligence cause an explosion which would annihilate a number of persons. Great difficulty might arise on proving the actual death of one particular individual, yet it would be a travesty on justice to say that the wrongdoer could not then be again arraigned for the criminal killing of some other named victim. In the two imaginary cases the evidence would be different thereby observing the distinction noted and discussed in *Driggers v. State*, 137 Fla. 182, 188 So. 118 and other cases cited there.

One of the tests often required by this and other courts is whether the evidence will be the same in each prosecution.

It is well to point out here that in addition to the difference in identity of the victims the statute requires different proof in other respects. In one case the state was required to prove culpable negligence. Intoxication, instead of culpable negligence, is required in the other. See *State v. Bacon*, supra. Each is a separate offense. For an identical case see *People v. Trantham*, 24 Cal. App. 2d

177, 74 P. 2d 851. See also Culpepper v. State, 44 Ga. App. 351, 161 S.E. 849.

We have considered the other assignments of error and find them without merit.

The judgment is affirmed.

Terrell, Chapman, Barns and Hobson, JJ., concur.

Thomas, C. J., and Sebring, J., agree to conclusion.